

NEWMONT MINING CORP.

IBLA 98-469

Decided December 6, 1999

Appeal from a combined decision issued by the Arizona State Director, Bureau of Land Management, and the Forest Supervisor, Tonto National Forest, approving separate mining plans of operations on their respective lands. AZA 28631.

Affirmed.

1. Administrative Procedure: Administrative Review--Mining Claims: Plan of Operations--Rules of Practice: Appeals: Standing to Appeal--Rules of Practice: Protests

An appellant that has not been provided the opportunity to comment on the FEIS prior to approval by BLM and the Forest Service of separate mining plans of operations for their respective lands (because of the failure to issue the FEIS 30 days prior to the issuance of the ROD), but who comments as soon as the FEIS is made available and within 30 days of issuance, is a "party to a case" within the meaning of 43 C.F.R. § 4.410(a) for purposes of appeal. An appellant who is a party to the case and who can show that he could be adversely affected by the agency decisionmaking will have standing to appeal.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

NEPA is primarily a procedural statute designed to insure a fully informed and well-considered decision. It requires that an agency take a "hard look" at the environmental effects of any major Federal action. An EIS must fulfill the primary mission of NEPA, which is to ensure that a Federal agency, in exercising the substantive discretion afforded it to approve or disapprove a project, is fully informed regarding the environmental consequences of such action. In deciding whether

an EIS has done so, it is well settled that a rule of reason will be employed such that the question becomes whether the statement contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.

APPEARANCES: Shane R. Swindle, Esq., Karl M. Tilleman, Esq., and Michael M. Edson, Esq., Phoenix, Arizona, for appellant Newmont Mining Corporation; Dalva L. Moellenberg, Esq., Phoenix, Arizona, for Cyprus Miami Mining Corporation; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Newmont Mining Corporation (Newmont or appellant) has appealed from a combined Record of Decision (ROD) and Final Environmental Impact Statement (FEIS) issued June 26, 1998, by the State Director, Arizona State Office, Bureau of Land Management (BLM) (State Director), and the Forest Supervisor, Tonto National Forest (Forest Supervisor), for the Cyprus Miami Leach Facility Expansion Project (Cyprus Project) (BLM/AZ/PL-98/0015). The ROD approves implementation of separate mine plans of operations for BLM-administered lands and U.S. Forest Service (FS)-administered lands. The preferred alternative approved in the ROD envisions construction of three new leach facilities and one waste disposal site. A portion of the new construction is to be located on private land.

Respondents BLM and Cyprus Miami Mining Corporation (Cyprus or Cyprus Miami) have each moved, in their respective Answers, to dismiss Newmont's appeal for lack of standing. The record reflects that appellant's only participation in the decision-making process with respect to this ROD and FEIS occurred in a comment letter dated July 24, 1998, nearly a month after the ROD and FEIS issued. The comment letter is dated the same day as appellant's Notice of Appeal, amounting to a simultaneous comment/appeal.

The FEIS relates, in pertinent part:

The public review process started with the Notice of Intent to prepare an EIS by the federal lead agencies (BLM Phoenix Field Office and Tonto National Forest) published in the Federal Register and local newspapers on October 28, 1994. The Notice of Intent solicited comments on the proposed project and notified the public how comments could be made. The lead federal agencies distributed approximately 890 scoping letters to individuals and organizations on the agencies' mailing lists. Two scoping meetings were also held in order to inform the public and to receive comments on the proposed project. The first meeting was held in Miami, Arizona on November 16,

1994, and the second meeting was held in Mesa, Arizona on November 17, 1994. Approximately 140 people attended the two meetings. Comments received during the public scoping period (October 28 to December 17, 1994) were then considered during the preparation of the Draft EIS. A total of 48 written letters or comment forms were submitted during the public scoping period.

The Cyprus Miami Leach Facilities Expansion Draft EIS was distributed for public comment on April 9, 1997, and its availability was announced in the Federal Register on April 14, 1997. The BLM and Forest Service received written comments and held two public hearings to receive comments during the comment period which ended June 10, 1997. The first public hearing was held in Miami, Arizona on May 14, 1997, and the second in Mesa, Arizona on May 15, 1997.

Approximately 75 people attended the two hearings. Ten people spoke at the hearing in Miami and seven people spoke at the hearing in Mesa. A total of 48 comment letters was received by both agencies.

(FEIS at 3-1; see also Affidavit of Moon Hom, Ex. D to BLM's Answer.)

[1] We have stated that, for an appellant to have standing to appeal from a BLM decision under 43 C.F.R. § 4.410(a), the appellant must be a party to the case and have a legally cognizable interest that is adversely impacted by the decision on appeal. See Washington County, Utah, 147 IBLA 373, 378 (1999); Blue Mountains Biodiversity Project, 139 IBLA 258 (1997); Laser, Inc., 136 IBLA 271 (1996); Stanley Energy, Inc., 122 IBLA 118, 120 (1992); Storm Master Owners, 103 IBLA 162, 177 (1988). If either of these two requirements is absent, an appeal must be dismissed. See National Wildlife Federation v. BLM, 129 IBLA 124 (1994); see also Mark S. Altman, 93 IBLA 265, 266 (1986).

In Altman, supra, we summarized the development of the doctrine of standing applied by this Board to cases coming before it for review, stating:

43 CFR 4.410(a) provides that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." To be a "party to a case" a person must have "actively participated in the decisionmaking process regarding the subject matter of [the] appeal." To be "adversely affected" by a decision "the record must show that Appellants have a legally recognizable interest." The interest need not be an economic or a property interest; use of the land involved or ownership of adjoining land suffices. "Mere 'interest in a problem' or 'deep concern with the issues' involved, however, does not.

The Board will not speculate why an appellant is concerned about a decision, *i.e.*, what interest is adversely affected. Appellant must allege or the record must show an interest that is injured. A person must be both a party to a case and have an adversely affected recognizable interest in order to have a right to appeal to the Board. If either element is lacking, an appeal must be dismissed.

Id. at 265, 266 (citations omitted).

We must agree that Newmont is a party to the case. 1/ While appellant did not participate as a party prior to the date of the decision which it challenges, the regulation at 43 C.F.R. § 3809.4(g) expressly provides that "[n]either the decision of the authorized officer nor the State Director shall be construed as final agency action for the purpose of judicial action of that decision." 2/ Moreover, 43 C.F.R. § 4.21(c) provides that exhaustion of administrative remedies is required unless a petition for stay was filed and it was denied. In such a case, the decision being appealed is "final so as to be agency action subject to judicial review under 5 U.S.C. 704." Id. In the instant case, since Newmont never filed a petition for stay, the decision below is not final for the purposes of obtaining judicial review. If we were to treat the decision as final, we would be required to find that BLM violated the procedures at 40 C.F.R. § 1506.10(b).

1/ In its Reply to BLM's and Cyprus Miami's Answers, Newmont contends that it is a party to the case because it participated in the decision-making process by providing comments on the FEIS during the 30-day availability period following issue. (Reply at 11.) Citing BLM Handbook H-1790-1, p. V-12 (1988) (Handbook), appellant recites that the Handbook provides that BLM must consider any comments received on the FEIS during this 30-day period, and "determine whether a supplemental draft EIS or supplemental final EIS is warranted." Id., quoting Handbook at V-13. Appellant notes that the Handbook also provides that any BLM decision based on an FEIS may not be implemented until the 30-day comment period has run. Id., citing Handbook at V-23. Newmont relies on regulatory language that states that, except as provided by other regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. See 43 C.F.R. § 4.21. For the reasons stated herein, however, Newmont was a party because the regulation at 40 C.F.R. § 1510.10(b)(2) required that it be permitted 30 days to comment on the FEIS prior to issuance of the ROD, and it provided comments within 30 days of issuance of the FEIS during a period that the ROD was not final. See 43 C.F.R. § 3809.4(g).

2/ C.f. 5 U.S.C. § 704 (1994), which requires that agency action be "inoperative" if exhaustion of administrative remedies is to be required.

Those rules provide that:

No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

* * * * *

(2) Thirty (30) days after publication of the notice described in paragraph (a) of this section for a final environmental impact statement.

40 C.F.R. § 1506.10.

The BLM Manual reflects this requirement by noting that "[t]he final EIS must be made available to the public for a minimum of 30 days. The date the EPA [Environmental Protection Agency] notice appears in the Federal Register initiates the 30-day availability period." Handbook, V-12 at 5. The Manual continues: "Following the 30-day availability period, a decision may be made." Handbook, V-12 at 6. The Manual clearly presupposes that the FEIS will be issued 30 days prior to the ROD.

There is an exception to the 30-day rule established in 40 C.F.R. § 1506.10(b)(2). It provides:

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently.

Id.

It is clear from the BLM actions in this case that it has invoked the exception to the standard procedures set forth above. In doing so, it must also provide appellant with a "real opportunity" to alter the decision. By submitting its comments within the 30-day period following issuance of the FEIS and concurrently submitting its appeal within 30 days of the BLM decision, Newmont has met the requirements to become a party to the case.

The procedural regulations at 43 C.F.R. § 4.410(a) also provide that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right of appeal

to the Board * * *." Thus, one must be both a party to a case and have a legally cognizable interest that is adversely affected by the decision in issue. E.g., Petroleum Association of Wyoming, 133 IBLA 337 (1995); Mark S. Altman, *supra* at 266. "If either element is lacking, an appeal must be dismissed * * *." Mark S. Altman, *supra*; see also National Wildlife Federation v. BLM, 129 IBLA 124 (1994).

The issue here is not whether appellant is a "party to a case;" the issue is whether it is "adversely affected." To be adversely affected, the interest allegedly affected by the decision under review must be a legally cognizable interest and the allegation of adverse effect must be colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect. National Wildlife Federation v. BLM, *supra* at 127; Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). The interest need not be an economic or property interest, but mere interest in a problem or deep concern with the issues will not suffice. Robert M. Sayre, 131 IBLA 337 (1994). We have recognized that the use of the land involved or ownership of adjacent property may constitute a sufficient interest. Southern Wilderness Alliance, *supra* at 327; The Wilderness Society, 110 IBLA 67, 70 (1989). Nonetheless, the threat of injury and its effect on an appellant must be more than hypothetical. Missouri Coalition for the Environment, 124 IBLA 211 (1992); George Schultz, 94 IBLA 173, 178 (1986). Standing will only be recognized where the threat of injury is real and immediate. Salmon River Concerned Citizens, 114 IBLA 344 (1990).

We conclude that Newmont has identified specific facts which give rise to a conclusion that it could well be adversely affected by approval of the mining plans of operations. The purported threat of injury is reported as follows:

Currently pending in the United States District Court for the District of Arizona is an action in which Cyprus (and others) are suing Newmont to recover costs allegedly incurred in remediating groundwater contamination in the vicinity of Cyprus' mining and processing operations--the very operations that are connected to the leach expansion project that the ROD at issue here approves. See The Pinal Creek Group, consisting of Cyprus Miami Mining Corp., et al. v. Newmont Mining Corp., et al., No. CIV 91-1762 (D. Ariz.). As demonstrated in Newmont's SOR, and as unrefuted in Cyprus's and BLM's Answers, the Leach Facility Expansion Project approved by the ROD presents the potential to significantly exacerbate the groundwater pollution in the area of Cyprus' mine.

We are unsure of the extent of that potential for increased pollution because the EIS fails to evaluate many of the potential environmental consequences flowing from the approved action. There can be no doubt, however, that just as Cyprus is attempting to hold Newmont jointly and severally liable for the cost of remediating the contamination that

currently exists at the site, Cyprus will attempt to hold Newmont liable for any additional costs occasioned by contamination arising from the implementation of the leach expansion project approved by the ROD at issue here. Thus Newmont is directly and adversely affected by the ROD, and has standing to challenge the EIS that underlies the ROD.

(Reply at 14.) We find that this assertion contains an element of real and immediate injury. First, it is shown that Newmont has a continuing interest in the land as a result of the ongoing litigation concerning its possible liability for contamination as a result of its own operations. Second, the threat of adverse impact should additional contamination occur as a result of the actions of Cyprus Miami in implementing the mining plan of operations is more than "merely speculative and without factual support." Thus, we conclude that Newmont has standing to bring this appeal.

The June 3, 1998, decision (Decision) appealed from provides in pertinent part:

BLM

It is the decision of the Arizona State Director (BLM) to approve the Cyprus Miami Leach Facility Expansion Project Mine Plan of Operations as described in Alternative A - Modified Development Sequence (Agency Preferred Alternative). The Mine Plan of Operations includes all minor modifications and mitigation measures evaluated and adopted through the date of issuance of the ROD. The Mine Plan of Operations incorporating the mitigation measures in the decision will also provide a list of the mining claims within this expansion plan area and existing Mining Plans of Operation. The approval does not imply or otherwise serve as recognition of the validity of any mining claim or mill site to which it may apply.

Forest Service

It is the Forest Service decision to authorize Alternative A - Modified Development Sequence (Agency Preferred Alternative) when all requirements for the approval of the Plan of Operations for the Cyprus Miami Leach Facility Expansion Project have been met. The Plan of Operations will include all minor modifications and mitigation measures evaluated and adopted through the date of issuance of the ROD.

(Decision at 2-1.)

The decision components of the approved alternative (Agency Preferred Alternative) provide that the first activity under the approved plan of operations will be preparation of the area for the BL leach facility. Concurrently, the Barney waste rock disposal area will be constructed

to receive waste rock, and existing haul roads will be extended to the Barney site. In the 1999 to 2000 time frame, the GMC leach facility will be constructed. New pipelines for leach solution transfer and new haul roads will be connected to the existing facilities. In the 2004 to 2005 time-frame, the Oxhide leach facility will be constructed. New pipelines for leach solution transfer and new haul roads will be connected to the existing facilities. (Decision at 2-1.)

In its Statement of Reasons (SOR) for appeal, Newmont claims that BLM failed to take the required "hard look" at the potential environmental effects associated with the approved action. Specifically, appellant states that the EIS ^{3/} is deficient for the following reasons:

1) The EIS does not evaluate the direct and indirect impacts of actions that are necessarily connected to the approved action, nor their resulting cumulative effects. Specifically, the EIS addresses only those impacts that might directly result from the approved action. The approved action, however, is only one component of an integrated copper production operation. By expanding Cyprus's entire copper production operation, the approved action will expand the environmental impacts of each component of that operation. Yet the EIS ignores these other components.

2) The FEIS does not adequately address - or in many cases, address at all - the substance of comments submitted in response to the DEIS, including significant comments received from the Salt River Project (an Arizona water utility affected by the approved action) and the United States Environmental Protection Agency (which gave the DEIS its second lowest rating, concluding that the DEIS did not contain sufficient information to make an informed decision concerning the action's potential environmental impacts).

3) In some instances, the EIS defers to unanalyzed information that is found in Cyprus Miami's Arizona State Aquifer Protection Permit application and other unspecified documents. Accordingly, the EIS fails to satisfy the requirement that the BLM independently evaluate the potential impacts of proposed actions.

(SOR at 4-5.)

In its Answer, Cyprus states that the actions other than the approved action, which Newmont contends are "connected actions," are previously existing, ongoing mining operations conducted by Cyprus. (Cyprus Answer

^{3/} The EIS is used to refer to both the Draft Environmental Impact Statement (DEIS) and the FEIS. See FEIS Cover Letter (stating that the DEIS and FEIS together constitute the "complete EIS.")

at 7.) Cyprus states that these activities are already being conducted and do not require any further Federal action or approvals. Id. Consequently, Cyprus claims, regardless of their connection to the action taken by BLM, the existing mining activities are not "actions" subject to the National Environmental Policy Act of 1969 (NEPA) as defined by the Council on Environmental Quality (CEQ) at 40 C.F.R. § 1508.18(a). Id. For this reason, Cyprus states, they cannot be "connected actions" as defined in 40 C.F.R. § 1508.25. Id.

Cyprus urges that none of the cases cited by Newmont support the proposition that an ongoing, existing activity that does not require any Federal action is a "connected action" that also requires environmental impact analysis. (Cyprus Answer at 8.) Moreover, Cyprus claims, since the ongoing operations are being conducted separate from the action taken by BLM, they have independent utility and will proceed regardless of BLM's action and do not rely upon BLM's action for their justification. Id.

In its Answer, BLM asserts that appellant's claimed "connected processes" are not "connected actions" under 40 C.F.R. § 1508.25(a)(1) that had to be analyzed together in an EIS. (BLM Answer at 16.) Citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 103 S. Ct. 1556 (1983), BLM emphasizes that the terms "environmental effect" and "environmental impact" include a requirement for a reasonably close causal relationship between a change in the environment and the effect at issue. (BLM Answer at 17.) BLM posits that an EIS need not address remote and highly speculative consequences. Id., citing Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980); Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060 (8th Cir. 1977). Moreover, BLM claims, EPA Region 9, with coordination from EPA Region 8 in the air and water review, reviewed the FEIS and found, subject to two "remaining concerns," the FEIS adequate. (BLM Answer at 18, citing July 24, 1998 EPA letter; Ex. E to Answer.) 4/ BLM asserts that the EPA finding and the manner in which EPA's remaining concerns were addressed (citing Ex. F to Answer; BLM memorandum to file dated August 31, 1998) makes any charge of insufficient NEPA analysis altogether without basis. (BLM Answer at 18.)

In response to the claim that BLM failed to adequately address cumulative impacts, Cyprus states that the EIS took a hard look at all potential environmental impacts of the proposed action in relation to the existing Cyprus mining operations, and that Newmont merely disagrees with conclusions drawn in the EIS. (Cyprus Answer at 8.) Cyprus notes

4/ The July 24, 1998, EPA letter notes:

"Our review indicates that the FEIS adequately addresses our objections regarding the Draft Environmental Impact Statement (DEIS), which were sent to you in a letter dated June 18, 1997. EPA commends the U.S. Forest Service and Bureau of Land Management (USFS/BLM) for selecting Alternative A as the Agency Preferred Alternative * * *."

that the EIS does discuss various environmental impacts of the existing operations as the baseline environmental conditions represented in the no-action alternative, including modifications to the existing operations that would result from the leach expansion. (Cyprus Answer at 9.) Cyprus explains that the EIS contains a number of references to consideration of potential environmental impacts from Cyprus' existing mining operations as part of its analysis of the baseline environmental conditions (i.e., the no-action alternative) and cumulative environmental impacts. ^{5/}

In its Answer, BLM states that, with respect to Alternative A (Preferred Alternative), the DEIS addressed cumulative effects differences from the proposed action in terms of 12 resources, citing, e.g., (1) air resources, DEIS at 4-69 through 4-75 (BLM claims Alternative A would have fewer emissions of PM₁₀, NO_x, and SO₂ than the proposed action; this alternative, BLM claims, would also have fewer emissions than the no-action alternative); (2) groundwater, DEIS at 4-69 and 4-77 (BLM claims only difference results from when or if potential impacts would occur from development of the Oxhide facility and how potential impacts could be reduced; BLM also states that new technology or regulatory status of Webster Lake could change the 7-year delay for the Oxhide facility); and (3) surface water, DEIS at 4-69, 4-77 (under Alternative A, BLM found that potential impacts at the Oxhide facility would either be delayed or eliminated; potential loss of three ponds and a seep would be delayed for 7 years; and, subject to the status of the Webster Lake site, impacts at the Oxhide facility would be reduced or would not occur). (BLM Answer at 26.)

Further in regard to cumulative impacts, BLM responds that the joint agency team found that expansion resulted in no change in the discharge basin. BLM states that the DEIS found (starting at 4-22) that the proposed leaching facilities should not significantly affect groundwater flow or the depth to groundwater underneath and down-gradient of the proposed leaching sites. (BLM Answer at 27.) BLM notes that changes in the existing pits at BL and Oxhide were analyzed, and further, that the DEIS provides a detailed analysis of the leaching facilities noting that each site was designed as a closed-circuit system that meets Arizona Department of Environmental Quality (ADEQ) Best Available Demonstrated Control Technology. Id., citing DEIS at 4-23.

^{5/} See DEIS §§ 3.1.1.4 through 3.1.1.6 (air quality impacts of current operations); § 3.3.1.1.2, at 3-24 through 3-28 (impacts of historic and existing operations on groundwater quality); § 3.3.2.2.1, at 3-37 and 3-38 (impacts of historic and existing operations on surface water quality); § 3.9, at 3-98 (visual impacts of existing facilities); § 3.10, at 3-104 and 3-105 (hazardous materials handling, including acid tanks); § 4.1.1.1, at 4-3 through 4-6 (air emissions from mining and solvent extraction/electrowinning activities); §§ 4.2.3.1.3 and 4.2.3.2.3, at 4-22 and 4-27 (groundwater effects of expansion of BL Pit under proposed action). The proposed action and the selected preferred alternative are exactly the same except for the sequencing of actions, and thus the impacts on ground water should not differ.

In response to Newmont's criticism of BLM's responses to the public comments received, Cyprus claims that BLM was direct and to the point. (Cyprus Answer at 11.) As an example, Cyprus claims that, in response to a question concerning the disposition of mine dewatering water, BLM explained that mine dewatering is already occurring under present operating conditions at the mine, and therefore, expansion of operations will not change the circumstances. (Cyprus Answer at 12.) With respect to the issue of model calibration, Cyprus contends that appellant's criticism is misplaced because if all models used for EIS work had to be calibrated based upon actual site-specific information, regardless of whether that data is available, few models could be used to predict impacts as required for NEPA analysis. Id. Cyprus claims that the very use of the term "model" means that site conditions "are being interpolated and extrapolated based on certain information or assumptions." Id. Finally, Cyprus urges that Newmont is wrong in criticizing the BLM response to a comment which states that quality control/quality assurance procedures will be incorporated in a materials handling plan because the BLM response did not include an outline of a plan. (Cyprus Answer at 12.) Cyprus states that a waste rock handling plan is included as part of the documents evaluated for the EIS. Id., citing DEIS § 7.0 and Golder Associates Inc. 1996, "Determination of Applicability for the Barney Overburden Facility."

In response to these same criticisms, BLM notes that appellant has offered three examples from different portions of the same EPA comment letter--one of 56 comments submitted. (BLM Answer at 28.) BLM states that all comments referred to by the appellant within "FS Letter 12," as well as the other comments received, were addressed in the FEIS by a joint agency interdisciplinary team made up of specialists from not only BLM and FS, but also, as appropriate, from other agencies such as EPA, Fish and Wildlife Service, Arizona Game and Fish Department, and the Army Corps of Engineers. (BLM Answer at 29.) BLM asserts that EPA's comments on groundwater radioactivity, chloride modeling and acid generating waste rock were specifically addressed by agency specialists, but that, in any event, these June 1997 concerns are now moot since the July 24, 1998, EPA Letter (Ex. E to Answer) removed EPA's objections and commended BLM and FS for selecting Alternative A, modified development sequence. (BLM Answer at 29.)

In response to Newmont's final area of concern, that BLM allegedly deferred to the analysis of environmental impacts conducted by other agencies, Cyprus urges that BLM appropriately relied upon technical information supplied by third parties, including the Aquifer Protection Permit Application, and reached its own conclusions from that information. (Cyprus Answer at 13.) Cyprus claims that a review of the EIS makes it clear that BLM conducted its own independent analysis of environmental impacts. Id. Cyprus further asserts that the two specific issues cited by Newmont as examples of BLM deferral to other agencies are not at all examples of BLM deferral to another agency for evaluation of environmental impacts, but rather its valid reliance upon a specific state law program to implement required measures for future environmental protection. Id., citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Department of the Navy, 108 IBLA 334, 336-37 (1989). Cyprus claims it is

entirely appropriate for BLM to rely upon legally enforceable requirements of state agencies, such as required permits, for the development of detailed mitigation plans, and monitoring plans and detailed operational and compliance plans, to implement the mitigation measures required in the ROD. (Cyprus Answer at 14.) Finally, Cyprus states that Newmont is incorrect in claiming that no aquifer protection permits for the project have been issued, as the ADEQ issued an aquifer protection permit for the BL pad leach stockpile in May 1998. Id.

In its Answer, Respondent likewise claims that Newmont's allegation that BLM improperly relied on outside determinations is without merit. BLM asserts that Newmont's examples of improper reliance in the areas of (a) monitoring potential groundwater degradation, and (b) surface water quality assurance, are not supported by the facts. (BLM Answer at 30.) BLM explains that an interdisciplinary team experienced in evaluating mining plans of operations, permit applications and other permit processes, evaluated potential impacts using surface and groundwater baseline studies listed in the Cyprus DEIS (at 7-1 to 7-10) as well as documents submitted by Cyprus as part of its permit application. Id. Moreover, BLM states, a final monitoring plan is to be submitted to both BLM and FS by Cyprus for approval. Id.

[2] NEPA, 42 U.S.C. § 4321 (1994), as amended, is primarily a procedural statute designed "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). It requires that an agency take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

In Robertson v. Methow Valley Citizens Council, supra at 350-51, the Court stated:

NEPA does not mandate particular results, but simply prescribes the necessary process. * * * If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. * * * Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action.

An EIS must fulfill the primary mission of NEPA, which is to ensure that a Federal agency, in exercising the substantive discretion afforded it to approve or disapprove a project, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. § 1500.1(b) and (c); Natural Resources Defense Council v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987).

In deciding whether an EIS has done so, it is well settled that a rule of reason will be employed such that the question becomes "whether an EIS contains a 'reasonably thorough discussion of the significant aspects

of the probable environmental consequences.'" State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting from Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

The main thrust of appellant's NEPA argument is that the EIS is inadequate because it does not analyze the direct, indirect, and cumulative impacts of existing copper mining operations at the Cyprus Miami Mine which appellant claims are necessarily connected to the approved action. We address first the claim that BLM's examination of impacts resulting from the mine enlargement was inadequate.

We find that BLM did adequately address groundwater and surface water, as well as the other impacts arising from enlargement of the Cyprus Miami mine in Chapters 3 and 4 of the DEIS and FEIS (which together constitute the EIS). Hydrologic studies, groundwater flow patterns, and groundwater quality impacts of the Cyprus Miami mine expansion were addressed in Chapters 3 and 4 of the DEIS. See DEIS at 3-23 to 3-40, 4-22 to 4-33. The DEIS concluded that the impact to groundwater as a result of construction of three new leach facilities and the proposed Barney waste rock site should be minimal. (DEIS at 4-23, 4-25.) The DEIS further determined that the impact to groundwater quality in the five existing mine pits as a result of the Proposed Action (same as Preferred Alternative except in slightly different sequence) should be minimal for the following reason:

The groundwater in the Project Area and the vicinity of the pits is currently impacted from past mining activities; this is described in chapter 3, Section 3.3.1.3.2. For the reasons described above in items 1-3 under 4.2.3.2.1 Leaching Facilities, it is unlikely that groundwater reporting to the pits from the leaching facilities will further degrade groundwater quality.

(DEIS at 4-27.)

The "Cumulative Impacts" sub-part of the groundwater section of the DEIS similarly concluded that: "No further cumulative effects to groundwater quantity or quality were identified as a result of the Proposed Action. Cumulative effects would occur to groundwater quantity in the regional aquifer due to extended life of pumping to dewater the mine pits." Id. Nevertheless, an extensive program of mitigation and monitoring would be implemented for groundwater quality, to include: (1) A Quality Assurance/Quality Control (QA/QC) plan for installation of the geomembrane lining systems at the leach facilities; (2) quarterly groundwater monitoring using selected wells from the existing groundwater monitoring network in accordance with the State of Arizona Aquifer Protection Permit (APP); (3) periodic inspections of the facility drainage systems, evaporation/ sediment ponds and surface diversions to ensure proper functioning; (4) a QA/QC proposal to ensure implementation of the Waste Rock Handling Plan; and (5) a continuing review of closure technologies for copper oxide heap leach facilities with update reports provided to BLM and FS every 2 years throughout the life of the project. (DEIS at 4.2.3.4.)

In its study of surface water effects, BLM likewise determined that the three leaching facilities would have little or no impact on surface water quality, because surface runoff originating up-gradient of the leach facilities would not come in contact with the leaching facilities; this water would be captured before it reaches the leaching pads and diverted to down-gradient sumps and ponds, or in the case of the BL impoundments, be evaporated. (DEIS at 4.2.4.2.) Similarly, the Barney waste rock site should have no significant impact on surface water quality because surface runoff originating up-gradient of this facility would be captured before it reaches the site and diverted to down-gradient sumps and ponds. (DEIS at 4.2.4.2.2.) Another reason that surface water should not create a problem under this design is that precipitation falling on the Barney site will be coming in contact with Gila Conglomerate, a nonacid-producing waste rock. Finally, the EIS determined that additional impacts to water in the mine pits is unlikely because any water affected by the leaching pads up-gradient would be diverted and captured as previously described. (DEIS at 4.2.4.2.3.) From these findings, the ROD determined that "[t]he FEIS complies with or is consistent with all applicable laws including, but not limited to, the following:" Mining Law of 1872, as amended, 30 U.S.C. § 21 (1994); NEPA, as amended, supra; Clean Air Act, 42 U.S.C. § 7401 (1994); Clean Water Act, 33 U.S.C. § 1251 (1994), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1994). (ROD at 5-1 to 5-4.)

However, our review of this expansion proposal convinces us that there may be significant indirect impacts on the mining operations at the Cyprus facility if the expansion is approved. The EIS makes clear in its No Action Alternative analysis that, if the leach facility expansion project is not approved, mining will begin closure in 2007, with the facilities being terminated in 2017. Under the No Action Alternative, the total amount of mined copper will be 1 billion pounds. Under Alternative A, however, mining closure will not commence until 2011, with final closure occurring no sooner than 2021 (and possibly continuing until 2033, if "reasonably foreseeable new ore" is delineated). Total production under this scenario (excluding "reasonably foreseeable new ore") is 2.8 billion pounds, almost triple the amount mined under the No Action Alternative. See DEIS at 2.3 and Figure 2-2 and Figure S-1. Thus, almost two-thirds of the total projected production at the mine is directly attributable to the leach facility expansion and would not occur but for its approval. This production and the effect of this production on the environment is an indirect effect required to be analyzed in the EIS.

Moreover, notwithstanding both Cyprus' and BLM's arguments that BLM and the FS have no control over the continuation of mining by Cyprus, this is not true. The on-going mining activities are under a plan of operations (MPO 81-P-003) approved by BLM and another plan of operations approved by the FS (No. 89-12-02-003 (as amended)). Under the applicable regulations, the Authorized Officer may order a modification of a plan when he or she determines that it is causing undue or unnecessary degradation. See 43 C.F.R. § 3809.1-7(c)(4). The Government clearly has the authority to

intervene in such circumstances. If, on the basis of the environmental analysis, the Government concluded that the cumulative effects of increased mining (which is made possible by the expanded leach treatment facilities) would negatively impact the environment, the Government could refuse to approve the expanded leach facility.

Notwithstanding the foregoing, however, we find that the FEIS and DEIS do respond effectively, contrary to appellant's claim, to indirect and cumulative impacts on water values and other values in the context in which they will occur under the plan of operations, i.e., in the EIS analysis of baseline production as reviewed within the No Action Alternative. Since mining is already occurring, the baseline analysis in the No Action Alternative necessarily takes into consideration all impacts of mining at the present levels. It is this steady state of continued production which the proposed leach pad expansion program will allow beyond the current projected closure if the proposal is approved. See DEIS, Table S-1 at S-5.

Continued operation of the Cyprus Mine at 1997 production levels as a result of approval of Alternative A was analyzed in the EIS. For example, in the analysis of emissions, the DEIS analyzed the effect of the increase in both the duration and total quantity of mining attributable to adoption of Alternative A. See DEIS at 4.2.1.1. Similarly, the DEIS noted that "[c]umulative effects would occur to groundwater quantity in the regional aquifer due to the extended life of pumping to dewater the pits." (DEIS at 4.2.3.3.) The DEIS also addresses the possible additional impacts caused by continued mining to water quality resulting from the extended mining schedule. Certain of those are addressed above in the context of surface runoff affecting surface water quality (DEIS at 4.2.4.2), and the effect of utilization of the Barney waste rock site under Alternative A (DEIS at 4.2.3.1.2). In each case, the DEIS analysis determined that the incorporation of the new facilities at the Cyprus Miami Mine to enable continued steady-state mining "should have little or no impact to surface water quality." (DEIS at 4.2.4.2.1.) Moreover, under Alternative A, surface water quality monitoring would occur for the life of the project and during closure of the Cyprus Mine. (DEIS at 4.2.4.6.)

The effect of an extended mining schedule on wetlands and open water through approval of the expansion project at the mine was addressed as well. See DEIS at 4.2.4.4. A very small wetlands area (50- by 50-feet), 5.22 acres of jurisdictional open water, and 6.6 acres of nonjurisdictional open water would be affected by approval of Alternative A. See DEIS at 4.2.4.4. The loss would include three ponds at the Oxhide facility and one reservoir at the BL facility. Under Alternative A, two reservoirs would be constructed at the BL facility for a potential maximum of 84 acres of open water habitat. However, these reservoirs would be dry from time to time. Id.

In addition, the DEIS describes a detailed mitigation plan, coordinated through the U.S. Army Corps of Engineers, for loss of waters of the United States. This plan includes:

- * The 3.94 acres of lost washes would be mitigated through the construction of diversion channels surrounding the three leach facilities and the Barney waste rock site.

- * The 5.22 acres of lost surface impoundments would be mitigated by the creation of the Webster Gulch and Little Pinto Canyon impoundments. These impoundments would be located up-gradient of the BL Leach Facility.

- * The loss of 0.06 acres of wetlands would be mitigated by the wetland vegetation that will develop around Webster Gulch and Little Pinto Canyon impoundments.

- * An 8 acre area owned by Cyprus Miami located adjacent to Pinal Creek would be restored to a native bosque. Establishment of this riparian habitat mitigates for the lost wetlands and zero-riparian washes habitat at a ratio of 2:1.

(DEIS at 4.2.4.4.) The DEIS explains that the effectiveness of the mitigation measures is predicted from hydrologic models using annual rainfall, runoff, and evaporation values. See DEIS at 4.2.4.6.

We similarly find that the mitigation measures described in the DEIS and FEIS for Alternative A adequately respond to appellant's concerns under FLPMA. Under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), the Secretary is directed to take, by regulation or otherwise, any action necessary to prevent unnecessary or undue degradation of public lands. Further, 43 C.F.R. § 3809.0-5(k) provides that

unnecessary or undue degradation means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.

See 43 C.F.R. § 3809.2-2; Charles S. Stoll, 137 IBLA 116, 125 (1996); Arthur Farthing, 136 IBLA 70, 73 (1996). We find that the requirements of FLPMA, described above, have been met in BLM's analysis of the mine enlargement project and in the protection of water and other values represented in the mitigation measures described in the DEIS and FEIS.

Appellant likewise finds fault with BLM's response to public comments, while citing in its briefs only the three concerns of the EPA included in one comment letter related to the DEIS. We have carefully reviewed the comments submitted and BLM's responses thereto and we find no fault with BLM's response thereto. Moreover, the record clearly reflects that the EPA concerns have now been satisfied and/or satisfactorily addressed. See FEIS at 3-5 to 3-107.

Finally, we are unpersuaded by appellant's claim that the EIS process was deficient because it relied on other environmental or regulatory documentation (particularly the APP application) for providing data that is ultimately utilized in concluding that there will be no cumulative effects on groundwater quality or quantity as a result of the direct and indirect effects of approval of Alternative A. The interdisciplinary team that reviewed and evaluated the mining plan of operations evaluated impacts utilizing a number of surface and groundwater baseline studies listed in the Cyprus DEIS as well as documents submitted by Cyprus Miami as a part of its APP. See DEIS at 7-1 to 7-10. We find no error in such reliance and no provision within NEPA or in the implementing regulations promulgated by the CEQ that precludes such consideration. In fact, CEQ, in its 1986 regulatory changes, now requires Federal agencies faced with the unavailability of information concerning a reasonably foreseeable significant environmental consequence, to consider all existing credible evidence and prepare an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b) (1987); see also Robertson v. Methow Valley Citizens Council, supra at 354. The hydrologic modeling described in the DEIS, using all available creditable data, to include annual rainfall, runoff, and evaporation values, is precisely the scientific evaluation the CEQ requires.

For the reasons stated above, we find that the EIS adequately considered the environmental impacts of the approved alternative. The EIS assesses the current environmental condition of the Cyprus Miami complex affected by the enlargement, and details the current condition of various resources or areas of concern and the expected impact the enlargement would have on them. (FEIS, Chapter 3.) BLM, moreover, met the standard established by the CEQ regulations at 40 C.F.R. Part 1500. The EIS did consider the overall effect the enlargement process would have on water, air, and other resources similarly impacted by the on-going mining operation.

As a related matter, we find no error in BLM's overall scoping process. Extensive and thorough consultations were conducted. All significant interests were considered. Comments were received and carefully reviewed and addressed, including those submitted by EPA. The proper scope of the NEPA analysis in this case was a plan of operations filed pursuant to 43 C.F.R. § 3809.1-4 and the environmental review of that plan was thorough and complete.

To the extent appellants have raised other arguments in this case that have not been specifically addressed, they have been considered and rejected. See Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, appellant's appeal of the BLM and FS decisions to approve the plan of operations submitted by Cyprus Miami is denied and the decisions appealed from are affirmed.

James P. Terry
Administrative Judge

I concur:

James L. Burski
Administrative Judge